Exhibit H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IRA BROUS,

Plaintiff,

v. 24 Civ. 1260 (ER)

ELIGO ENERGY LLC,

Conference

Defendant.

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New York, N.Y.
May 9, 2024
3:30 p.m.

Before:

HON. EDGARDO RAMOS,

District Judge

APPEARANCES

FINKELSTEIN BLANKINSHIP FREI-PEARSON & GARBER LLP
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(The Court and all parties appearing remotely)

THE COURT: Good afternoon, everyone.

This is Judge Ramos. Jazmin, please call the case.

(Case called)

DEPUTY CLERK: Counsel, please state your name for the record starting with counsel for plaintiff.

MR. McINTURFF: Good afternoon, your Honor.

This is Burkett McInturff from Wittels McInturff Palikovic on behalf of plaintiff and the proposed class. I also have here with me my colleague, Gregory Blankinship, from the law firm of Finkelstein Blankinship Frei-Pearson & Garber, also on behalf of plaintiffs and the proposed class.

DEPUTY CLERK: Counsel for defendant.

MR. WATSTEIN: Your Honor, good afternoon.

Your Honor, this is Ryan Watstein from Watstein Terepka for the defendant. With me in the room, I have my colleagues, Leo O'Toole and Abigail Howd.

THE COURT: Good afternoon to you all. This matter is on for a conference. I note for the record that it is being conducted by telephone. We are here at the request of the defendant. However, this is the first time that the parties have appeared before me, so, Mr. McInturff, let me begin with you. Why don't you tell me a little bit about what this case is about.

MR. McINTURFF: Yes. Thank you, your Honor.

This is Burkett McInturff. Eligo, the defendant, is a supplier of energy, so gas and electricity in deregulated utility markets across the country. Eligo is what's called an energy services company or an ESCO, especially in New York, ESCO is the term.

Now, Eligo buys and sells energy on deregulated markets. And the background here is that the idea behind deregulation is that if states opened up their wholesale energy markets, companies like Eligo could buy from that wholesale market and then resell it at retail to customers and compete with the utility. The idea was that competition would drive down consumers' monthly bills.

So Eligo buys its gas and electricity on the same market as the utility. So as a customer in New York and other states, you've got a choice. You could either buy your energy from companies like Eligo or you can go with the traditional utility.

Well, Eligo's customer contract says that it's rates are calculated from those very market prices, but the complaint shows that Eligo charges three times on average that wholesale market price. Now that's a breach of contract. It's also a violation of New York and other states' consumer protection statutes. A company can't promise a large group of consumers that they're going to price their service in a certain way and then violate that promise.

Now, important context here is that in 2021, the State of New York through its regulator, the New York Public Service Commission, banned the very variable rates, the rates that Eligo charged New Yorkers. Those were banned in 2021. Yet, Eligo continued to charge and sell that exact variable rate product.

I will also add that today, today on May 9, Maryland's governor just signed that state's legislation banning the same variable rates that were charged to class members here.

So we brought a case on behalf of consumers in the nine markets where Eligo does -- sells energy of deregulated gas and electricity, and we brought claims for breach of contract, breach of that very customer contract that promises a rate calculated from the wholesale market prices, and we brought consumer protection claims under those states laws.

Now, Eligo's letter, as we said in our response, is a partial -- you know, asserts a partial dismissal argument. They want to move to partially dismiss the case. Aside from being inefficient, the vast majority of Eligo's arguments go to the scope of the class. And it is very well settled that arguments there to be settled at the Rule 23 class certification stage should be settled at that stage with the benefit of discovery.

So Eligo argues, for example, there are contracts that have different choice of law provisions that would mean that

customers who were subject to those contracts can't litigate in this case in New York. Well, those contracts aren't in the record. And it's a paradigmatic example as to why these issues under Second Circuit authority and a legion of cases, some of which we cite in our letter, make it clear that issues like that are decided at class certification.

So that takes out the overwhelming majority of the defendant's arguments proffered in its letter. The remaining argument --

THE COURT: Can I just stop you for a second, Mr. McInturff?

I mean, it's not in the record, but is it true?

MR. McINTURFF: We have no indication that that is the case, so it's -- and we don't know, and it is not in the record. And, in addition, whether or not those venue clauses railroad enforceable is an issue, and then whether or not those claims, if they were brought in other states, wouldn't be consolidated back into New York anyway.

So there are a number of issues there raised by this idea that there are these other venue clauses out there. But it's not ripe, your Honor.

THE COURT: How many states is your class?

MR. McINTURFF: The proposed class encompasses -- it's nine -- sorry -- it's eight states and Washington D.C..

THE COURT: Thank you.

Mr. Watstein, is it?

MR. WATSTEIN: Yes, that's the correct pronunciation. Thank you, your Honor.

THE COURT: I'm sorry, you can go ahead, Mr. Watstein.

MR. WATSTEIN: Sure. Thank you.

I'll start by saying that we disagree entirely with plaintiff's characterization of the facts, unsurprisingly. We are not geared to talk about the facts necessarily, but I'll say a couple of things. First of all, this is a case that's brought by two individuals, one of whom, we understand, has unfortunately since passed away, which is something that I wanted to raise, maybe not something we need to discuss right this moment, but my point is only that there are two, now maybe only now one, hand selected individuals that had a contract with an entity called Eligo New York, so one company.

Now they've also sued a parent company, but they haven't sued the companies that offer energy and have contracts with consumers in the eight other jurisdictions where they purport to -- or the eight other jurisdictions pursuant to the laws of which they purport to bring claims. And of course so we've got these two, maybe one, New York plaintiffs that have only ever seen New York contracts with an entity that doesn't offer services in those eight other states. They haven't sued the entities that do offer services in those other states, but they're attempting to use this case as a vehicle to get

discovery as to a litany of other entities that have completely different contracts under completely different regulatory schemes on behalf of plaintiffs who all have binding forum selection provisions and have contractually chosen to litigate any claims that they might have in those other states.

And so, you know, your Honor asked is that true. And the answer is yes. And, of course, we have those agreements and we will put them in the record. I understand that they are not yet in the record and that is because, you know, the Southern District of New York of course has a premotion requirement, and that is why we're here today. The only thing that's been filed in the case is a complaint so far. So, of course, there is not that information in the record because, like plaintiff's counsel said, they have no indication, and they do not know quoting, you know, what those other contracts say.

So, you know, plaintiff's characterization of the facts are not accurate. For example, you know, the contention that Eligo was charging multiples of the rates that a utility was charging is kind of a neither here nor there because there is a separate contract at play here that we contend permits exactly the type of billing that was engaged in in this case. It's not tied to supply costs, as plaintiff claims that it is. But that's not really relevant here because the only claim that we're not moving or that we do not intend to move to dismiss is

the contract claim of the named plaintiffs and the reason for that is that particular claim is going to require some degree of discovery, right? We've got to have discovery on how rates are calculated and what the terms in that contract mean. We contend that Eligo's practices in New York were exactly as they were supposed to be pursuant to the contract.

But one of the things that I wanted to clear up, the product that Eligo is offering is totally different than the product that utilities offer. Many of the variable rate contracts that Eligo offers are either very large part green energy or in some instances all green energy in contrast of utility. So it makes sense that the price would be calculated differently than a utility.

The other thing, of course, Eligo is a small company with only a few thousand customers in New York. Of course their pricing is completely different from utilities. Again, these issues are kind of beside the point for this current premotion conference. As our letter explained, this is not a cookie-cutter motion to strike that attacks issues of predominance without any evidence. I've defended 400 class actions across the country. We never file those types of motions. So plaintiff's arguments that that is what we are proposing is just wrong. To the contrary, our motion to dismiss/to strike will explain that there are only two plaintiffs in the case, both New York residents with contracts

with Eligo New York, one entity. So they cannot assert claims under nine other states' laws and under contracts with other entities, over a half dozen other entities in other states that they don't have and that they've never seen.

And as we'll explain, that's so for a litany of independent reasons. For example, venue is improper for out-of-state commercial claimants because they -- sorry -- consumer claimants because they have state specific forum selection clauses, number one. The Court lacks personal jurisdiction over Eligo LLC as to all out-of-state claimants, number two. Plaintiffs don't state a claim as to Eligo New York as to all out-of-state claimants, of course, because, as you heard counsel say, they have no idea what those out-of-state contracts entail. They make no allegations that any entity that provides electricity in those other states did anything in breach of a contract or a statute, number three.

Number four, contrary to plaintiff's characterization that we are challenging Article III standing, we are not. Nothing in our letter said that we were. We are challenging statutory standing, plaintiff's statutory standing to assert claims under consumer protection laws that don't protect them. There is no question that these named plaintiffs, New York residents who have contracts with a New York entity cannot sue that entity or any other under, for example, the law of Massachusetts, the law of Pennsylvania, particularly given that

some of those statutes have pre-suit notice requirements, which of course haven't been satisfied. That's the fourth reason.

And then as a fifth reason as to the commercial contracts, plaintiffs can't assert claims under those contracts because they don't have commercial contracts. They are not commercial customers. They are consumers. And there are more granular points that I can get into, but I guess the big picture point that I'm trying to get across is that our motion is not some scattershot motion that challenges predominance based on issues of fact prematurely. It is a very targeted motion that says, look, we've got two New York plaintiffs here. They only have New York claims. You can't use this as a vehicle to assert claims on behalf of nonexistent people who have chosen not to sue, who have forum selection provisions. Those issues need to be decided at the outset: Issues of personal jurisdiction, venue, they need to be decided at the outset.

So it's also our position that our forthcoming motion to dismiss should be decided before discovery opens because, again, contrary to plaintiff's contentions, our motion will turn this case, if successful, into a case asserting effectively dozens of claims against almost a dozen entities in nine jurisdictions to a single defendant, single state breach of contract claim.

THE COURT: Thank you, Mr. Watstein.

Mr. McInturff, obviously none of this is going to be decided today, but I will give you an opportunity to respond briefly.

MR. McINTURFF: Thank you, your Honor.

Let's just start from first principles here. I'm going to read from Second Circuit in *Langon v. Johnson & Johnson*. This is cited on page 3 of 4 of our premotion letter. That's ECF document 17.

"Whether a plaintiff can bring a class action under the laws of multiple states is a question of predominance under Rule 23(b)(3), not a question of standing under Article III."

Now, while defense counsel has stated that his attacks on the ability of New York consumers to sue on behalf of other consumers served by the same company in other states, he's asserted that that is not an Article III attack, we respectfully disagree. Defense counsel has attempted to argue around the Second Circuit by re-packaging arguments that are fundamentally Article III arguments as, for example, statutory standing.

Well, the basis of the statutory standing argument that my adversary advances is this notion that it's these various state specific LLCs that are conducting all of the challenged conduct in that case. But the complaint makes very, very clear that these state specific LLCs are all operated as a single entity, Eligo Energy. The documents that are attached

to the complaint that were sent to our clients say Eligo Energy. There are references to Eligo.energy New York LLC, but there's also references to Eligo Energy. The complaint makes clear that the misrepresentations and omissions that give rise to the consumer protection claims in this case came from a unified course of conduct overseen by Eligo Energy. So that under Second Circuit precedent, those out-of-state consumer protection claims are in the case.

When the defendant talks about there being a lack of personal jurisdiction for out-of-state claims, we make clear in our letter -- and now I'm reading from page 2 of 4 of ECF 17 that: "Most courts do address the issue have concluded that the holding in Bristol Myers does not apply to federal class actions." That's the basis of the defendant's claim that there is no personal jurisdiction for out-of-state claims.

Defendant's claim about venue, as I mentioned in the opening, it is based on a factual assertion about contracts that are not in the record that can't be resolved on a motion to dismiss. The defendant would have to prove that other class members actually contracted with these entities. We would then have to deal with the issues that I raised about whether these venue clauses are enforceable. It is simply not something that can be resolved on a motion to dismiss.

Again, because the defendant only seeks a partial motion to dismiss, and this is really just an effort to winnow

the scope of the class before discovery, we think that there is no basis to stay discovery. Discovery should proceed in the ordinary course, like it does in many, many multistate class actions, and that these issues can be worked out.

There is one other point that I forgot to mention. Defendant contends that commercial customers, unlike residential customers, can't be members of the class. Well, we just had a case certified last year in the Eastern District of New York that made it very clear that commercial customers can pursue the same type of claims as residential customers against these energy companies because the pricing mechanisms are the same.

So the question at the heart of this case is what are the contractual promises that the defendant made to its customers across the country, and then what are the representations and material omissions that are challenged in this case, and whether those representations and omissions were made beyond New York. And those are fundamentally factual questions that cannot be resolved at the motion to dismiss.

So we think that the correct course of action here is for the Court to schedule the initial case management conference and allow us to proceed to discovery so that we can get facts to resolve these issues and not have them take up party resources while defendant files a bunch of papers and then we have to discuss whether or not the motion should be

converted into a motion for summary judgment. We are just simply not there, your Honor.

THE COURT: Well, I don't know that you need to convert it to a motion for summary judgment if he's alleging lack of jurisdiction, et cetera, but that is neither here nor there.

I am going to allow defendant to make the motion. It will be done on the following schedule:

The motion will be due May 30. The response will be due on June 20. And the reply will be due on June 27.

But I am not going to stay discovery. And the parties should put together a discovery schedule on the form that you will find on my website and submit it on consent by no later than end of day Monday. Yes, who is speaking?

MR. WATSTEIN: This is Ryan Watstein.

THE COURT: Yes, sir.

MR. WATSTEIN: If I may just ask as to the discovery issue. I understand your Honor's ruling, and I'm always -- I will not try to change your mind. I guess what I will seek is a bit of clarification. Since our motion attacks the out-of-state claims, and we don't take issue with discovery occurring as to the New York claims that are -- we're not challenging that are in the case and that will be the subject of discovery, may I ask if discovery -- well, before our motion to dismiss is decided, may discovery be limited to the New York

claims?

THE COURT: Yes. Yes. Discovery will be limited to the New York claims.

MR. WATSTEIN: Thank you, your Honor.

THE COURT: Okay.

MR. McINTURFF: Your Honor, this is Burkett McInturff. If I could just briefly respond to clarify that that would be related to the defendants in this action, their conduct in New York as pled in the complaint, so that we are -- it's not otherwise limited. The only limitation being geographic but not in any other substantive way.

THE COURT: Correct.

And with that, gentlemen, we are adjourned. Be well.

(Adjourned)